COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-842

H.I.

vs.

M.S.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals from the 2017 issuance and one-year extension of an abuse prevention order pursuant to G. L. c. 209A. The defendant argues that the plaintiff, his former wife, did not sufficiently show a reasonable fear of imminent serious physical harm, and so the judge had no basis to extend the order. As the defendant has not identified any clear error in the judge's findings, we affirm.

Background. In filing for the c. 209A abuse prevention order, the plaintiff alleged that she was concerned for her safety because the defendant, or someone of whom he had knowledge, attempted to break into her home on August 17, 2017, and again on September 8, 2017. Her affidavit cited the defendant's anger issues and stated that while in court on August 7, 2017, for an unrelated proceeding, the defendant told

her with an angry expression and clenched fists, "cunt your [sic] going down." She repeated in testimony at the extension hearing that she was afraid of the defendant, stating that she had been followed and harassed, including at her workplace, by private detectives and others hired by the defendant. She further testified that her brothers had been staying in her home overnight to protect her. To show the defendant's capacity for using force, she recounted an incident from their marriage[1] in which the defendant allegedly had twisted her arms behind her back, yelled at her, pushed her down some stairs, and warned her not to disobey him again because "the next time . . . everyone in the family would be punished and it would be much worse." The defendant testified that the plaintiff's allegations were "frivolous," "groundless," and that he had "done nothing."[2]

Discussion. 1. Abuse prevention order. A plaintiff may obtain a G. L. c. 209A abuse prevention order by showing, by a preponderance of the evidence, that the defendant has placed her

[1] The parties divorced in 2006.

[2] The defendant attempted to offer additional evidence on appeal. But "[w]e cannot base our decision on facts not contained in the record" that was before the judge. Love v. Massachusetts Parole Bd., 413 Mass. 766, 768 (1992). The plaintiff's motion to strike portions of the defendant's brief and record appendix is therefore allowed, to the extent that we have not considered any evidence that was not before the judge in the G. L. c. 209A proceeding. Similarly, the defendant's postargument motion to file supplemental appendix, consisting of additional material not before the judge in that proceeding, is denied.

in reasonable fear of imminent serious physical harm. See Iamele v. Asselin, 444 Mass. 734, 739-740 & n.3 (2005). "In evaluating whether a plaintiff has met her burden, a judge must consider the totality of the circumstances of the parties' relationship." Id. at 740. By extending an order, a judge has implicitly, if not expressly, found that the plaintiff had such a reasonable fear, and we review that finding for clear error. See Diaz v. Gomez, 82 Mass. App. Ct. 55, 62 (2012). Compare DeMayo v. Quinn, 87 Mass. App. Ct. 115, 116-117 (2015) (judge's finding that sufficient harassment occurred to issue G. L. c. 258E harassment prevention order is reviewed for clear error).

The judge, who was in the best position to evaluate the parties' demeanor and credibility, was entitled to credit the plaintiff's testimony and affidavit. See Vittone v. Clairmont, 64 Mass. App. Ct. 479, 487-488 (2005). "In a bench trial credibility is 'quintessentially the domain of the trial judge [so that his] assessment is close to immune from reversal on appeal except on the most compelling of showings.'" Prenaveau v. Prenaveau, 81 Mass. App. Ct. 479, 496 (2012), quoting Johnston v. Johnston, 38 Mass. App. Ct. 531, 536 (1995). We cannot overturn the judge's implicit finding that the defendant placed the plaintiff in reasonable fear of imminent serious physical harm unless that finding was clearly erroneous. "A

finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Marlow v. New Bedford, 369 Mass. 501, 508 (1976), quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). Although the plaintiff's evidence may not have been overwhelming, the defendant has not persuaded us that the judge's finding was clearly erroneous.

The judge also acted within his discretion when, at the extension hearing, he denied the defendant's motion to vacate the September 14, 2017 ex parte order, and to focus instead on whether the order should be extended.[3] The judge's approach in this regard did not constitute "'a clear error of judgment in weighing' the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives" (citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). To the extent that the defendant claims unfair surprise from the plaintiff's filing of a supplemental affidavit at the September 29, 2017 extension hearing, he was free to

[3] In any event, the ex parte order expired on the date of the hearing. In addition, the materials that the defendant attached to the motion to vacate -- orders issued in the parties' divorce proceeding in 2011 concerning custody and visitation of the parties' minor son -- were of limited relevance to the G. L. c. 209A proceeding. They did not depict the plaintiff favorably as of that time, but neither did they require the judge to find that the plaintiff had no reasonable fear of imminent serious physical harm by the defendant as of 2017.

request a continuance to allow him time to respond. He did not do so. We thus affirm the extension order.

2. Attorney's fees. Each party argues that the other's position is frivolous, warranting an award of appellate attorney's or other fees and costs. Because the plaintiff has prevailed, her position is not frivolous. As to the defendant's position, "[w]e are hesitant to deem an appeal frivolous and grant sanctions except in egregious cases," of which this is not one. Symmons v. O'Keeffe, 419 Mass. 288, 303 (1995). We therefore decline to award appellate fees to either party.

Extension of abuse prevention order dated September 29, 2017, affirmed.

By the Court (Henry, Sacks & Ditkoff, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: August 7, 2019.

[4] The panelists are listed in order of seniority.